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No. 512

IN THE

SUPREME COURT

OF THE

United States

VICTOR L. DE CASAUS,
Appellant,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Appellee.

PETITION FOR CERTIORARI

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To the Honorable Earl Warren, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

COMES NOW VICTOR L. DE CASAUS and petitions this Honorable Court for a Writ of Certiorari, directed to the District Court of Appeal of the State of California, Second Appellate District, Division Two, and in respect thereto, sets forth as follows:

JURISDICTION

Jurisdiction is conferred by reason of Title 28, Sections 1291, 1294 and 2101, U. S. Codes and by Rule 19(a) of the United States Supreme Court, on appeal from state courts. The judgment in the court below was rendered on April 18, 1957. A Petition for Rehearing was duly filed and denied on ..... 1957, and thereafter a Petition for Hearing was duly filed in the Supreme Court of the State of California, and denied by that court on June 12, 1957. An order recalling the remittitur pending determination of the cause by this court was made on June 19, 1957 and thereafter the remittitur was stayed on June 24, 1957 (R. 1). Justice Black of this court extended the time for filing this petition to and including September 30, 1957.

STATUTES INVOLVED

Penal Code, Section 192:

"Manslaughter is the unlawful killing of a human being, without malice. It is of three kinds:

1. . . .

2. . . .

3. In the driving of a vehicle—

(a) In the commission of an unlawful act, not amounting to felony, with gross negligence; or in the commission of a lawful act which might produce death, in an unlawful manner, and wtih gross negligence.

(b) In the commission of an unlawful act, not amounting to felony, without gross negligence; or in the commission of a lawful act which might produce death, in an unlawful manner, and with gross negligence.

This section shall not be construed as making any homicide in the driving of a vehicle punishable which is not a proximate result of the commission of an unlawful act, not amounting to felony, or of the commission of a lawful act which might produce death, in an unlawful manner. Leg. H. 1872, 1945 ch. 1006."

Penal Code, Section 193: Punishment.—

"Manslaughter is punishable by imprisonment in the State prison for not exceeding 10 years, except that a violation of [1] subsection 3 of Section 192 of this code [2] is punishable as follows: In the case of a violation of subdivision (a) of said subsection 3 of the punishment shall be either by

imprisonment in the county jail for not more than one year or in the State prison for not more than five years, and in such case the jury may recommend by their **verdict that the punishment shall be by imprisonment in the county jail; in the case of a violation of subdivision (b) of said subsection 3, the punishment shall be by imprisonment in the county jail for not more than one year.** In cases where, as authorized in this section, the jury recommends by their verdict that the punishment shall be by imprisonment in the county jail, the court shall not have authority to sentence the defendant to imprisonment in the State prison, but may nevertheless place the defendant on probation as provided in this code. Leg. H. 1872, 1943 ch. 321, 1945 ch. 1006."

Penal Code, Section 26: Persons Capable of Committing Crime.—

"All persons are capable of committing crimes except those belonging to the following classes: . . . Five persons who committed the act charged without being conscious thereof."

Penal Code, Section 19a:

"In no case shall any person sentenced to confinement in a county or city jail, [1] or in a county or joint county penal farm, road camp, work camp, or other county adult detention facility, or committed to the sheriff for placement in any such county adult detention facility, on conviction of misdemeanor, or as a condition of probation, or for any reason, be committed for a period in

excess of one year; provided, however, that the time allowed on parole shall not be considered as a part of the period of confinement. [2] Leg. H. 1933 ch. 848, 1941 ch. 552, 1949 ch. 1390, 1951 ch. 1412."

Penal Code, Section 654:

"An act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions, but in no case can it be punished under more than one; an acquittal or conviction and sentence under either one bars a prosecution for the same act or omission under any other. In the cases specified in sections 648, 667, 668, the punishments therein prescribed must be submitted for those prescribed for a first offense, if the previous conviction is charged in the indictment and found by the jury. Leg. H. 1872."

California Vehicle Code, Section 510:

"No person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent having due regard for the traffic on, and the surface and width of, the highway, and in no event at a speed which endangers the safety of persons or property."

Amendment 14 to the Constitution of the United States provides:

" . . . ; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

THE FACTS

Appellant of Mexican extraction, swarthy complexioned had an automobile accident on the San Bernardino Freeway in Los Angeles County seven minutes from the place of his employment, about a quarter to nine on the night of September 26, 1955. The point of the accident was a curve on the highway leading from the Eastern Avenue bridge under which traffic passes and goes downhill toward the curve at a rate of from 6/10 of a per cent to 3.06 per cent grade (R. 1192). Death actually resulted from headon collision of two cars in neither of which appellant was riding. Six people—the Golden family, and William Spackler—were killed in the accident and considerable publicity over television, radio and in the press followed.

The appellant was charged with six counts of manslaughter (R. 1-7). In one of the cars the entire Golden family, coming home on the freeway, were killed when their car, which had leaped the divider of the freeway and crossed into the other lane of traffic, was hit by another car coming westbound, driven by Charles Hearn. The two cars—that of Golden and of Hearn—came headon and the Golden family was wiped out and the Hearn family in the other car were all injured.

The theory of the District Attorney was that appellant's car had sideswiped the Golden car and had carried it over the divider and came to a stop at the far end of the divider. The appellant, however, was

thrown out of his car before it reached the divider, he was not too severely injured and was never seen across the divider, but only on the side where his car had been driving. It was his uncontradicted testimony that he was hit from the rear and was knocked out of his own car on to the freeway and that he did not know what happened after he was struck and was catapulted out of his automobile where he picked himself up later after coming out of his unconsciousness.

He was driving a two-tone Buick car, going east. Another Buick of the same year and model, came to rest on the same side of the freeway as he had been riding. Its occupant, William Spackler, also met his death in the accident. There were no marks that any of the traffic officers could find showing that the Spackler car had crossed the divider and, nevertheless, the prosecution's theory was that he was going west and that his car was going west. The appellant contended that the Spackler car had hit him from the rear.

The appellant produced physical evidence to show that he was struck from the rear. He also put on William Minter, an engineer working for the City of Los Angeles, and who was a West Point graduate, who testified as to the great extent of the damage on the rear of Casaus' car by being struck by another vehicle at a point if impact, the force of which would have thrown him into the Golden car (R. 1144-1218) and projects him out of his car. White paint of the same color as on the Spackler car was on the rear bumper of petitioner's car (R. 1190). The gas tank of peti-

tioner's car was bent sharply upwards (R. 1191) and the steel bar that reinforces the rear bumper was bent out of line approximately 8 inches. There was no evidence that petitioner's car had sideswiped or locked with another car (R. 1192).

The case was tried with great heat and passion, there being a large amount of publicity by radio, television and newspapers growing out of the six fatalities. The defendant was a Mexican by birth and appearance and this was also widely advertised. He was therefore entitled to all the protection which the trial and appellate courts could give. Nevertheless, an instruction which was tendered to inform the jury that it should not consider any information or radio broadcasts, television or newspaper comments, was refused by the trial court (Supp. Ct. Tr. R. 55). Likewise, a large amount of evidence was introduced showing that the defendant had been hit from the rear, his right rear being badly damaged, the seat of his car bent out and door sprung and that he was catapulted out of the car into unconsciousness through the accident (R. 1148-1218). There was no evidence whatsoever that at that time anyone had been hurt or fatally injured. Actually, the death of the persons occurred by the headon collision of two other automobiles, the Golden car which was hit headon by another car driven by David Hearn, coming westbound, after the Golden car had crossed the divider of the freeway.

On presentation of ample evidence, the petitioner was acquitted of driving while under the influence of intoxicating liquor. Nevertheless, to read the opinion

of the District Court of Appeals, that court has based its opinion not only on an erroneous statement of facts as to whether he was hit from the rear,—a misstatement that there was no evidence to support this statement,—but also statements are set out regarding the alleged use of liquor, a fact of which the appellant was fully acquitted by the trial jury. The question then arises before this Honorable Court whether such a conviction can stand as constituting due process of law under our American Jurisprudence where an appellate court not only misstates facts on the record on which it bases its opinion and which are shown by ample evidence to be contrary to the true facts, but also sets out other statements in its opinion on which the jury made an express and specific finding in favor of the appellant. We respectfully contend that a conviction based upon such a misstatement of facts violates due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States. This court sent back a record in *Chessman v. Teets*, 25 L.W. 4420, to correct it. An erroneous trial record cannot be the basis of sustaining a conviction, in effect that such a conviction based upon such an erroneous statement would be a violation of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States. It would be akin to sustaining a judgment on knowingly perjured testimony and violate due process, *Mooney v. Holohan*, 294 U.S. 103.

Chessman v. Teets, 25 L.W. 4420.

Although Chessman repeatedly requested this Court and other courts to consider this question, it was not until several efforts that this Court concluded that such a record cannot be the basis for sustaining the conviction and sent the case back for a corrected record (25 L.W. 4420). We submit that in the instant case the full, certified record by the official court reporter is before this Honorable Court and contradicts specifically the statements of the opinion of the District Court of Appeals, as follows:

(1) That appellant's car shows no evidence of being hit in the rear. This is false. That appellant's car was hit in the rear is established by uncontradicted evidence (R. 1144-1216);

(2) That appellant sideswiped the Golden car. The physical evidence of appellant's car contradicts this;

(3) "That appellant, while driving under the influence of intoxicating liquor," etc. was contrary to the express finding of the jury.

We set these facts up before the same court on petition for rehearing and again before the Supreme Court of California, which denied a hearing (R. following court's opinion). The court having acted under a mistaken assumption denied appellant due process.

Townsend v. Burke, 334 U.S. 736, 741, 92 L.Ed. 1690.

Likewise, the opinion of the District Court of Appeal bases its affirmance of the conviction upon statements that the defendant was driving under the influence of intoxicants. These statements which should not be the basis for sustaining the conviction as the jury specifically found to the contrary (Supp. Cl. R 31). Where an accused has been acquitted of a specific fact in the trial court, the appellate court has no right to base its opinion contrary to the express jury finding and a decision based thereon therefore violates due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States. (*Cole v. Arkansas,* 333 U.S. 196).

Mooney v. Holohan, 294 U.S. 103;
Townsend v. Burke, 334 U.S. 736-741;
Hysler v. Florida, 315 U.S. 411.

Section 19a of the Penal Code of California provided as follows, at the time of this accident:

> "In no case shall any person sentenced to confinement in a county or city jail, (1) or in a county or joint county penal farm, road camp, work camp/or other county adult detention facility, or committed to the sheriff for placement in any such county adult detention facility, on conviction of misdemeanor, or as a condition of probation, or for any reason, be committed for a period in excess of one year; provided, however, that the time allowed on parole shall not be considered as a part of the period of confinement. (2) Leg. H: 1933 ch. 848, 1941 ch. 552, 1949 ch. 1390, 1951 ch. 1412."

Nevertheless, the trial judge, contrary to the law, gave the appellant six consecutive sentences, growing out of the conviction of the six counts in the Information.

The question of whether an automobile driver can be held criminally liable when he is knocked unconscious and is no longer in his car, presents another question of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States if importance which this Court should consider and pass upon. The evidence of the defendant is uncontradicted that he was hit from the rear and catapulted from the car. The physical evidence shows these facts. After his car left his control on the side of the divider on which he was and he was no longer in it, he could not be held liable for any accident which followed. This Court has held that a person who is insane cannot be punished; *Phyle v. Duffy,* likewise, a person who is unconscious is not subject to criminal penalties after he became unconscious.

Sec. 26(5) California Penal Code. The California Penal Code provides, in Section 26(5) that a person who is unconscious is not liable for any act committed during that time. The holding therefore of the California courts is in violation of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

We challenge the basic speed law in the California courts as unconstitutional. We challenge it before the District Court of Appeal, Division Two, and also in the Supreme Court of California. The District Court of

Appeal, the highest court which passed on the question, denied our challenge and held this basic speed law to be constitutional. It only takes a quick reading of this law to see that it lets every driver of every motor vehicle decide what speed is or is not excessive and what speed is reasonable or prudent and allows every juror to guess or determine the same. Therefore, no one is on notice as to just what speed he may follow under this basic speed law. We submit that the statute is too vague, indefinite and uncertain to constitute penal legislation. **In a Nation full of automobiles this court should decide what kind of a speed law is constitutional and fair to millions of motorists.**

QUESTIONS PRESENTED BY THIS WRIT

(1) Whether California's basic speed law which provides that "no person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent, having due regard for the traffic on, and the surface of the highway, and in no event at a speed which endangers the safety of persons or property" is too vague, indefinite and uncertain to constitute penal legislation and therefore violates the due process clause of the Fourteenth Amendment to the Constitution of the United States.

(2) Whether the appellant was denied due process of law when the District Court of Appeal of the State of California decided the case upon its statement of the occurrence contrary to the actual facts, as shown by the record in the case, and whether such procedure and proceeding denied the appellant due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States. Whether a decision on appeal violates due process of law guaranteed by the Fourteenth Amendment to the United States Constitution where the opinion is based upon facts on which the trial jury acquitted appellant.

(3) Whether appellant's conviction for a traffic accident growing out of the movement of his automobile after he had been knocked out of his car, and was unconscious, violates due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

(4) Whether the trial court denied appellant a fair trial guaranteed by the Fourteenth Amendment to the Constitution of the United States.

(5) Whether the refusal to take the jury to the scene of the accident as requested by the defendant denied petitioner due process of law guaranteed by the Fourteenth Amendment.

(6) Whether the defendant was denied due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States when the court refused to instruct the jury to disregard radio and television broadcasts and newspaper broadcasts.

(7) Whether the defendant was sentenced illegally and in violation of due process of law where the maximum punishment under the law, as it existed at the time of the accident and at the time of the trial, limited the punishment for any reason whatsoever to one year in the County Jail, and the court, instead imposed six years' punishment in violation of the express statute.

(8) Whether Section 192 of the Penal Code as construed and applied, denies due process of law and the equal protection of laws guaranteed by the Fourteenth Amendment to the Constitution of the United States in making the defendant liable on the basis of the number of persons killed in the accident.

(9) Whether an automobile accident is single or plural, depending upon the number of people involved in it and whether the holding of the court below is

contrary to the expressed intention of the State Legislature of California and therefore contrary to the Fourteenth Amendment to the Constitution of the United States in its due process of law of causes and equal protection of law of causes.

(10) Whether the court's failure to give instructions on the physical evidence supplanting the evidence of eye witnesses when they conflict is a violation of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

REASONS FOR GRANTING THE WRIT

I.

CALIFORNIA'S BASIC SPEED LAW IS UNCONSTITUTIONAL FOR VAGUENESS AND UNCERTAINTY.

The jury was instructed by the court in California's basic speed law (Clk. Supp. Tr. 16) as follows:

> "The basic speed law of this state which will be so-called in my instruction, is as follows: No person shall drive a vehicle upon the highway at a speed greater than is reasonable or prudent, having due regard for the traffic on, and the surface and width of the highway, and in no event at a speed which endangers the safety of persons or property. A violation of this basic speed law is an unlawful act not amounting to a felony" (Clk. Supp. Tr. 16, Vol. I. cert. record).

The millions of automobiles now traveling in the United States and particularly in California and with the highways as they are and the streets and roads as they are, it becomes important for this court to determine whether such a statute is too vague, indefinite and uncertain to constitute the basic of a criminal prosecution. In Southern California alone, there are at least three million automobiles traveling on the highways and streets. In the rush work hours to and from work, there are at least a million automobiles or more jamming the roads.

To drive safely, what standards must a state set up which are definite and certain? This court has not yet determined this duty on the part of the state and whether a statute such as the one above violates due process of law for lack of definiteness (*U. S. v. L. Cohen Grocery Co.*, 255 U. S. 81, 92, 65 L. Ed. 516, 522; *Connally v. General Construction Co.* 269 U.S. 385, 391, 70 L. Ed. 322, 328; *Lanzetta v. New Jersey*, 306 U.S. 451, 83 L. Ed. 888; *Stomberg v. California*, 283 U.S. 359, 369, 75 L. Ed. 117, 1123.)

> ". . . . The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement. The crime 'must be defined with appropriate definiteness'."
>
> *Winters v. New York*, 333 U.S. 515, 92 L. Ed. 849.

What is a speed greater than is reasonable or prudent? "What is due regard" for the traffic on the sur-

face and width of the highway?" Who is to determine what is reasonable or prudent. Who is to determine the "due regard?" The young man of 22 who has a hot rod, the old man of 70 or 80, or older, who drives his car 30 to 40 miles an hour, the truck driver, the taxi-cab driver, the doctor, the prospective mother, or the speed officer? Obviously, every automobile driver of the more than three million vehicles in Southern California, has the right to speculate as to his own idea as to what is reasonable or prudent or what is "due regard." The law sets up no definite standard required in criminal cases. It is up to the driver of the vehicle. He will vary from his age to his occupation or to his physical condition, which a statute requires the driver to guess at the meaning of the statute and therefore violates the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Lanzetta v. New Jersey, 306 U.S. 451, 83 L. Ed. 888;

Stromberg v. California, 283 U.S. 359, 369, 75 L. Ed. 1117, 1123;

Connally v. General Construction Co., 269 U.S. 385, 391, 70 L. Ed. 322;

Screws v. U. S., 325 U.S. 91, 94, 189 L. Ed. 1495, 1498, 1502;

M. Kraus & Bros. v. U. S., 327 U.S. 614, 90 L. Ed. 894.

Furthermore, the statute allows every police officer to guess as to whether the driver of the car was driving at a reasonable and prudent speed and to

guess at whether the driver had due regard for the width of the highway, the traffic on it and the surface on it.

This statute is also unconstitutional on its face because it prescribes no standards but allows every police officer to use his own idea or discretion as to whether the law was violated. This violates the Fourteenth Amendment to the Constitution of the United States.

Saia v. N. Y., 334 U.S. 558, 92 L. Ed. 1574.

The second phrase of the statute also is void for vagueness, to wit, "and in no event at a speed which endangers the safety of persons or property." What standard is such a speed? Who determines whether the speed *endangers* the safety of persons or property? The driver of the vehicle, the police officer who makes the arrest, or the juror, or each juror who sits in the box? Certainly, there is no ascertainable standard of the speed which endangers the safety of persons or property. Thus, it permits every judge and juror to guess whether the speed was such as endangered the safety of the persons or property and permitted the officers who made the arrest, to guess whether there was an endangerment of person or property. We submit that the highways of the nation are now being built for greater speed rather than less speed. With the millions of automobiles now on the highways and freeways of the nation. This court should now grant certiorari and determine what law is sufficiently definite to constitute due notice and fair notice and what

shall constitute a proper and legal speed law. When this court realizes that more than fifty per cent of the California courts are taken up with traffic accidents in civil cases and numerous cases of criminal prosecution growing out of traffic accidents and when the basic law of traffic should be definite and certain and with fixed limitations and definitions, we respectfully submit that this becomes one of the most important cases for this court to consider this term of court. We respectfully submit that the statute in the several phrases of it is too vague, uncertain and indefinite to constitute penal legislation, as defined by this court and that, therefore, the judgment below should be reversed.

Stromberg v. California, 283 U.S. 359, 75 L. Ed. 1117;

M. Kraus & Bros. v. U. S., 327 U.S. 614, 90 L. Ed. 894;

Lanzetta v. New Jersey, 306 U.S. 451, 83 L. Ed. 888;

Saia v. N. Y., 334 U.S. 558, 562, 92 L. Ed. 1574, 1578;

Winters v. N. Y., 333 U.S. 504, 514, 92 L. Ed. 840;

We challenged the basic speed law in our appeal in the District Court of Appeal, as violative of the Fourteenth Amendment to the Constitution of the United States and that court denied our challenge and rendered an opinion upholding the constitutionality of the basic speed law (Opinion of the court, p. 8, at the

conclusion of the certified record, also in the Appendix to this petition). We petitioned the Supreme Court for a hearing, challenging the constitutionality of the basic speed law, page 21, 22 of our Petition for Hearing in the Supreme Court of California contending that the statute violated the Fourteenth Amendment to the Constitution of the United States and the Supreme Court of California denied our challenge by denying a hearing, (last page of certified record.) The question is fundamental and highly important and we respectfully pray for certiorari. We could have filed a direct appeal on the question of the constitutionality of the statute which would have entitled us to a hearing as of right on an appeal from the constitutionality of the statute and we think that the question is highly important for this Court to grant Certiorari.

II.

The appellant was denied due process of law guaranteed by the Fourteenth Amendment when the District Court of Appeal, contrary to the express finding of the jury, based its decision upon facts directly contrary to those found by the jury. Along with the various counts of manslaughter, which the appellant was accused, was a charge of driving his vehicle while under the influence of intoxicating liquor. A great amount of evidence was introduced by the State in support of this charge and contrary evidence by the defense, which offered to show that the appellant, as an aviator in the war, was given liquor for flying important bombing missions and it alerted his ability,

rather than impaired it in any way. The jury acquitted the appellant of the charge of driving while under the influence of intoxicating liquor. This fact then became *res adjudicata,* and the law of the case. Nevertheless, the District Court of Appeal, ignoring the express finding of the jury on this subject, the court, in its Opinion, based its decision on the facts on which the jury had acquitted the appellant, as set out in the appellate court's statement of facts. The court, California Appellate Court particularly, contrary to the express finding of the jury, in its opinion set up details of a blood test taken from Appellant's arm as to the percentage of Ethyl alcohol supposedly in appellant's blood. Nevertheless, the jury, having the defendant's version of the matters and the cross-examination of this expert that he has tested only a quantity of blood amounting the width of a human hair, rejected the People's contention. The Appellate Court, nevertheless, based its opinion contrary to that of the expressed finding of the jury. This violated due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

In *Cole v. Arkansas,* 92 L. Ed. 333 U.S., at page 196, to 92 L. Ed. 644, 333 U.S. 201, 92 L. Ed., 648, the court said:

> "Furthermore, since Arkansas provides for an appeal to the State Supreme Court and on that appeal considers questions raised under the Federal Constitution, the proceedings in that court are a part of the process of law under which the petitioners' convictions must stand or fall. *Frank*

> v. *Mangum*, 237 U.S. 309, 327, 59 L. Ed. 969, 980, Cf. *Mooney v. Holohan*, 294 U.S. 103, 113, 79 L. Ed. 791, 194. That court has not affirmed these convictions on the basis of the trial the petitioners were afforded."

In the instant case, the appellate court disregarded the expressed finding of the jury in the trial court and convicted and upheld the judgment on the basis of facts found contrary to the expressed finding in the trial court and the trial this petitioner was afforded. Such a proceeding violates due process of law. In *Cole v. Arkansas, supra,* this court held it is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made. (*Cole v. Arkansas* 333 U.S. 196).

> *De Jonge v. Oregon,* 299 U.S. 353, 362, 81 L. Ed. 278, 282.

We think it as much a violation of due process of law to uphold a conviction on a charge on the basis of evidence on which the accused was acquitted in the trial as it would be on convict him upon a charge that was never made.

III.

The District Court of Appeal upheld the conviction on the basis of alleged facts which are contrary to the express record and facts in the case. To uphold such a conviction violates due process of law guaranteed by

the Fourteenth Amendment to the Constitution of the United States. In the Supreme Court of California, in our Petition for Hearing, we challenge the action of the District Court of Appeal in trying the defendant and affirming his judgment on a non-existent charge, as violative of the Fourteenth Amendment to the Constitution of the United States (Petition for Hearing in the Supreme Court at the end of the record, pp. 6 and 7). The Supreme Court of California denied our challenge under the Fourteenth Amendment to the Constitution of the United States by denying a hearing. We respectfully submit that it is important to this Court to hear this matter, a Mexican, that he may have fair trial guaranteed by the Fourteenth Amendment United States Constitution.

Townsend v. Burke, 334 U.S. 736-741.
Mooney v. Holohan, 294 U.S. 103.

IV.

The District Court of Appeals erred in another respect and thereby denied the appellant due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States by acting upon non-existent facts, or facts contrary to the record of the facts as shown by the testimony in court. The appellant testified that he drove from his place of business at 1727 North Main Street to the point of the accident, which is only a few miles away and takes not more than seven minutes to reach by ordinary driving of 35 to 45 miles per hour. He testified that he drove to the intersection of Marengo and Soto Streets (R.

Tr. 909) and went east on Marengo, making all stops, then coming out at the freeway on the fourth lane (R. Tr. 910) from the City Terrace area (R. Tr. 911). On the freeway he was traveling 50 to 55 miles an hour (R. Tr. 913). There were other cars on the freeway and he could not drive 75 or 85 miles an hour (R. Tr. 913). He did not, at any time, drive next to the divider (R. Tr. 914 and 915). As he went into the turn, a car to his left suddenly turned in front of him (R. Tr. 918). He instinctively slammed on his brakes, the next instant he was hit from the rear and propelled backward (R. Tr. 918) and fell out of the car (R. Tr. 919) and he was no longer in the car, which was out of his hands and out of his control thereafter. His testimony is not only uncontradicted but supported by physical evidence of his car that he was hit from the rear by another car and thrown out of his automobile (R. Tr. 1148-1218). The District Court of Appeal, contrary to such physical facts, stated: "The evidence proved that neither the rear af appellant's vehicle nor its bumper had been damaged."

William H. Minter, an engineer, a graduate of West Point, testified at great length as to the physical damage to the rear of Appellant's automobile. (R. Tr. 1144 to 1214, incl.) Describing the right rear of appellant's car, the witness testified that the right rear bumper was deflected. The fender was bent considerably, it was smashed in. The right rear tire sustained considerable damage. The fuel tank, which was located in the rear, was damaged severely. The brace to the bump-

er was bent inward toward the center of gravity of thecar by over six inches. The entire body of the framework, the shell of the car was compressed longitudely so that there was buckling evidence on both the left and right sides of the car (R. Tr. 1149). The witness was a West Point graduate and postgraduate of Cornell University in Civil Engineering and in the Army Engineering School, and was a member of a board of inquiry regarding automobile accidents involving Government vehicles, particularly those connected with the United States Army (R. Tr. 1145, 1146). The Witness testified that the right rear of the DeCasaus car showed an impact of considerable magnitude. (R. Tr. 1149). The court ordered this stricken, but nevertheless the witness continued to describe the damage to the rear of appellant's automobile, in support of his testimony that he had been struck from the rear and was catapulted out of the automobile. The appellant court, ignoring this express evidence, decided the case on appeal contrary to the express facts shown by the record and the physical evidence. Such a decision and holding is contrary to the basic and fundamental principles of fair play and denied to appellant rights guaranteed by the Fourteenth Amendment to the Constitution of the United States. We contend in the District Court of Appeal that such a procedure violates due precess of law guaranteed by the Fourteenth Amendment to the Constitution of the United States and we asked the Supreme Court of California to hear the case on the basis of erroneous facts in the Opinion of the District Court of Appeal and that hearing was de-

nied and since the appellate process is a part of the process of law under which petitioner's conviction must stand or fall (*Cole v. Arkansas*, 333 U.S. 201, 202) we respectfully submit that the appellant was denied due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States, in upholding this conviction upon these erroneous facts.

Townsend v. Burke, 334 U.S. 736-741;
Mooney v. Holohan, 294 U.S. 103;
Hysler v. Florida, 315 U.S. 411.

V.

The opinion of the District Court of Appeal erred in another basic respect. From a reading of it, one would assume that the defendant directly caused the deaths of the six people named in the information. There is no evidence that anyone was killed while the defendant was in the automobile or that his car was the one that directly caused the deaths. The facts are that the Golden car, traveling east on the San Bernardino Freeway, at a dark turn near the Monterey Park cut-off, went over the divider, and was struck head-on by a car driven by David Hearn and containing his family, headed west on the north side of the freeway. [Exs. J to M; Rep. Tr. p. 126.] The entire Golden family were fatally injured. The Heard family was seriously injured and unconscious and could not tell about the accident. The Casaus car came to rest at the far and westerly side of the other cars driven by Golden and Hearn. It was free of any evidence of having side-

swiped the Golden car, which Mrs. Hallstrom had testified to, and on which the prosecution relied for its case. The photographs introduced both by the People and the defense show the absence on the left side of Casaus's car of sideswiping. Another 1955 Buick, same white color as the 1955 Buick of Casaus's two-tone Buick, left its paint on the rear bumper of Casaus's automobile.

Casaus testified and it is not only uncontradicted, but supported by the physical evidence of his car, that he was hit from the rear by another car, and thrown out of his automobile, was rendered unconscious, but came to, and started walking. He suffered a whiplash injury of the neck. His pants and shirt were torn as a result of the accident. [Rep. tr. p. 1023-1024.] A man named Jeffery came along and asked him if that automobile (pointing to the other Buick) was his car and he stated that it was not. Jeffery had pointed to the Spackler car which came to rest on the eastbound apron of the highway. Had Casaus been in his automobile at the time of the fatalities he would have either been dead or seriously crippled. The necessary physical inference supports the inference then, that not Casaus, caused the fatalities, but an independent intervening force over which he had no control and that he was not guilty of gross or any negligence within the meaning of the law.

The testimony of William Minter, an engineer who is a graduate of Westpoint, shows that there was an impact in back of the automobile which did great dam-

age to the right rear of defendant's automobile and necessarily catapulted him out of his car. The investigation also disclosed that the paint marks on the appellant's automobile matched the paint from the Spackler car.

An accused cannot be found guilty of a crime if he was knocked unconscious and thrown out of his automobile. Such unconsciousness renders him not liable for anything that happened thereafter.

In *Frank v. Mangum,* this Court held that a trial dominated by a mob is not a fair trial, and see *Lisenba v. California,* 314 U.S. 166. The only claimed eye witness prior to the accident was a Mrs. Lindstrom. The map she drew of the scene of the accident at the preliminary hearing was contrary to that at the trial. She claimed she saw a car coming behind her at a high rate of speed and drove off the freeway to the shoulder of the road. She claimed she saw this in the rear-view mirror. The defendant asked the court to have the jury taken to the scene of the accident so that it could see for itself whether this was possible, as the highway dips 3.6 per cent degrees, making such observation in a rear-view mirror absolutely impossible. The court nevertheless declined to take the jury to the scene.

It was the defendant's contention, supported by a strong physical evidence that he was hit from the rear by another car, most probably the Spackler car and that the right rear of his car shows such an impact of great force which catapulted him out of his automobile. Contrary to the stenographic certified record in the

case, the Appellate Court based its opinion upon a statement that there was no evidence of being struck from the rear. Such statement was entirely in error and completely inaccurate and where a court bases its opinion upon an inaccurate or unsatisfactory record, the accused has been denied a fair trial.

Townsend v. Burke, 334 U.S. 736-741;
Chessman v. Teets, 25 L.W. 4420.

Where there is a mistake of fact at any time an Appellate Court will even recall its remittitur to correct the injustice.

People v. Rothrock, 14 Cal. 2d 34.

CONCLUSION

For the foregoing several reasons, this petition for Writ of Certiorari should be granted, and the judgments below reversed.

Respectfully submitted,

MORRIS LAVINE,
Attorney for Petitioner.

APPENDIX

Opinion of the District Court of Appeal

[Crim. No. 5665. Second Dist., Div. Two Apr. 18, 1957.]

The People, Respondent, v. Victor L. De Casaus, Appellant.

Appeal from a judgment of the Superior Court of Los Angeles County. Clement D. Nye, Judge. Affirmed.

Prosecution for manslaughter. Judgment of conviction affirmed.

Morris Lavine for Appellant.

Edmund G. Brown, Attorney General, Clarence A. Linn, Assistant Attorney General, and Victor Griffith, Deputy Attorney General, for Respondent.

MOORE, P. J.—Appellant was convicted under six counts of involuntary manslaughter. Dissatisfied with the verdict and the sentence, he seeks a reversal of the judgment on the grounds of insufficiency of evidence, errors in refusing instructions, errors in rulings at the trial and excess of penalty.

Evidence Sufficient.

Driving a two-toned 1955 automobile, appellant left his office on North Main Street, Los Angeles, at 8:25 p. m. on September 26, 1955, headed for Imperial Val-

ley. After 8:30, just east of Soto Street on the San Bernardino Freeway going eastward, he cut in front of the witness Jeffrey who was going at 55 miles per hour in the center lane. Having passed a car in the third or inner lane, appellant returned to it and his left front wheel brushed against the center divider. Proceeding rapidly, he swerved into the center lane again to circumvent another car and when he returned to the third lane he brushed the center divider again. Appellant passed the witness Crook while moving at about 85 miles per hour in the center lane, and passed out of sight, but as Mr. Crook rounded the curve he saw something go over the center divider in much dust and smoke, out of which came a car whose driver fell out dead while still in the westbound side of the boulevard. Mrs. Hallstrom parked on the apron when she observed appellant's car overtaking her, speeding and swerving. She saw him twice sideswipe a station wagon, and on the second swipe saw him take it "across the divider," filling the air with smoke, sparks, dust and debris. The station wagon was driven by one Robert Golden. He, his wife and three children were killed.

David Hearn, returning to Los Angeles from Phoenix, entered the freeway at Rosemead. His car was one of the four in the accident. He suffered a broken wrist, injured knee, contusions and bruises. His wife received a broken ankle, a severed tendin, a concussion and cuts on the face; their daughter's arm was broken, her face and arms cut; their 5-year-old son received a broken arm.

Appellant's machine came to a standstill 4 feet from from the curb on the *westbound* lane. When the witness Jeffrey arrived, he approached appellant and called to him to stop, as the latter walked away saying he was going to see his brother. He could not explain the blood on his face but merely said: "I don't know how this happened. They stopped suddenly and I had to drive over the divider." Mr. Jeffrey returned appellant to the officers.

William L. Spackler, age 24, had been driving on the freeway toward Los Angeles when his ivory-colored sedan apparently collided with the Golden car from across the center divider. His body was seen by the witness Crook when it fell from his car. He had died from a 2-inch wound in the neck which severed the jugular vein and carotid artery; a hemorrhage due to rupture of the spleen and liver; also he suffered fractures of the thigh bone and both collar bones, an evulsion of the left ear, five broken ribs, a collapsed lung, a pint of blood in pleural and peritoneal cavities. Near Spackler was the Golden family, except the body of Mrs. Golden which lay on the floor of her station wagon.

Officers Sillings and Miller perceived the accident at 8:47 p. m.; parked their patrol car, saw defendant with Jeffrey; looked at the horrible results of the accident; radioed for patrol units and ambulances. When they returned to the spot where they had left appellant, he had departed. He was walking up the shoulder of

the eastbound lane, 25 feet away from the paved highway. Officer Miller ordered him to occupy the rear seat in the patrol car. Appellant produced his driver's licenses of California and New Mexico. The odor of alcohol was prevalent. Sillings was of the opinion that appellant was under the influence of alcohol. He had no brother in that vicinity.

The officers scanned the premises in search of evidence of reckless driving. Officer Agatha found a single skid mark from one wheel, 141 feet long in the third lane going west. It veered slightly to the left. The highway divider, he found, is a raised barrier 6 inches high and 10 feet wide dividing the freeway. Appellant told Agatha he was involved in the accident and pointed to his own machine across the freeway and said he was not sure what caused the accident; that he had had a couple of drinks at his office prior to leaving.

The proof was that it was not raining; the streets were dry; the weather clear, visibility good. Officer Agatha testified that there were lights enough to illuminate the roadway "so everything can be seen clearly";that the right rear wheel of Golden's station wagon was flat and there was expert proof that the break of the tire resulted from external force.

After the officers observed the strong odor of alcohol, they asked appellant to take the sobriety test. He willingly complied, but his responses were unsatisfactory. He pointed out to them his own car and

stated that he was on his way to Albuquerque. When asked whether he knew that his automobile was in the westbound side of the freeway, appellant did not know. He said he had left his office; entered the freeway, headed east; followed a group of cars; somebody hit him in the rear; he could not stop but swung to the left.

Officers Winkelman and Weimer visited with appellant and took him to the Angelus Emergency Hospital. He was moving his neck around and rubbing it. He told them he had had two Scotch and Sodas in a bar on Main Street near his office in Los Angeles. They advised him that in view of a definite alcoholic odor on his breath, it might be to his advantage to have a blood alcohol test to determine his blood's alcoholic content. By reason of the overcrowded condition at the Angelus, they took appellant to the Beverly Hospital. As they drove along, appellant repeated his statement about having imbibed two Scotch and Sodas at a bar on Main Street and remarked that they were at that time two blocks from the bar and would pass it. Officer Winkelman testified that as he spoke they were 7 miles from Main Street, Los Angeles.

At the Beverly Hospital, Dr. Goff removed blood appellant's arm at 11:30 p. m. It was analyzed by De-Loss R. Paul, a biochemist, for the presence of ethanol. It contained 0.180 of one per cent ethyl alcohol by weight volume. Mr. Paul testified that when a person's blood contains above 0.150 per cent alcohol, he is under its influence and could *not* "operate an automobile as

an ordinarily prudent and cautious person." In cross-examination, he said, by the "time anyone has a definite concentration in the blood, all people will react the same."

In August 1955 appellant's reflexes had been normal. On October 25, 1955, one month after the accident, he was treated for back strain and numerous contusions.

Appellant denied practically all the substantial testimony offered by the People; testified that after he had driven onto the freeway he stayed in the center lane; traveled around 50 or 55 miles per hour; did not drive next to the divider, was in the center lane, the car to his left as he went into the turn turned abruptly in front of appellant, he slammed on his brakes; was hit in the rear and propelled backward. When the machine swerved, he came forward and fell out right at the center lane, "I mean the eastbound shoulder." He testified that his car never sideswiped any other automobile; did not strike any other vehicle; Jeffrey did not call him; he did not tell Jeffrey he had driven over the divider; he exercised reasonable care at all times.

The evidence proved that neither the rear of appellant's vehicle nor its bumper had been damaged. The left front fender was buckled into a "V" shape. The impact was so severe that the left door would not open. The hood was pushed away from the body and up in the air. The witness Tobey introduced paint

scrapings to prove that appellant's machine contacted the car of Hearn, and that the Golden station wagon had collided with Spackler's sedan, and Hearn's car hit the right front door of the Golden's station wagon.

From the evidence and the inferences arising therefrom, it is abundantly established that appellant, while under the influence of intoxicating liquor, drove his automobile at grossly excessive speed along the freeway eastward from Los Angeles and thereby caused the deaths of six persons. By his exhaustive and able arguments, he presents no sound reason for holding that the evidence was insufficient.

Appellant's argument is such a discussion as would have been appropriately addressed to the jury. If it had been, they had rejected it and adopted evidence which justifiably establish his guilt. In that event, the judgment will not on that ground be disturbed. (People v. Newland, 15 Cal. 2d 678, 681 [104 P. 2d 778]; People v. Clark, 106 Cal. App. 2d 271, 280 [235 P. 2d 56]; People v. Freeman, 16 Cal. App. 2d 101 [60 P. 2d 333]; People v. Miller, 112 Cal. App. 535, 537 [297 P. 40].)

Appellant contends that where the operator of an automobile is suddenly stricken by an illness and becomes unconscious, he is not liable for a subsequent accident while his vehicle is out of control, citing Moore v. Capital Transit Co., 226 F. 2d 57 [96 App. D. C. 335]. By analogy he applies that case to the factual situation claimed by him. He says that he was thrown

from his car as the immediate result of its being struck in the rear, that he had no control over the car from the moment it crossed the divider and collided with the other cars while it was driverless, and that he is not responsible for its movements after he was thrown out. Conceding this to be correct from a legal standpoint, it can avail appellant nothing for the jury rejected the factual basis upon which the argument rests.

It is contended that the evidence does not show that at any time while appellant was driving his automobile, it killed any of the persons found dead on the freeway after he had finished his ride. But from the established facts such act and result were properly inferred. The exercise of the deductive processes is as important in weighing evidence as is the act of received direct proof of a pertinent act.

Appellant contends that the statute fixing the basic speed law is unconstitutional; that it is too v gue, indefinite and uncertain; that it permits every juror to guess for himself "as to whether the speed is greater than is reasonable, or prudent"; that it violates due process of law as provided by Articles I and IV of, and the Fourteenth Amendment to the Constitution of the United States, citing Orloff v. Los Angeles Turf Club, 36 Cal. 2d 734, 739 [227 P. 2d 449]; Lanzetta v. New Jersey, 306 U. S. 451 [59 S. Ct. 618, 8 L. Ed. 888] etc. He forgets that the decision as to whether a highway was too rough, too congested, or too narrow for the accused to drive in a safe manner at his speed in excess of 75 miles per hour is one for the

trial court to make based upon the evidence. Every motorist who drives at a rapid speed does so knowing that his judgment will be reviewed by the trial judge, in the event such motorist should be accused of negligent or reckless driving.

Where the evidence justifies it, there is no inhibition upon a court's finding that a motorist drove on a highway at 85 miles an hour; that it was crowded with vehicles or pedestrians or had chuck holes at every step and that a reasonable person would have driven at a speed not in excess of a lesser number of miles per hour. The contention that the basic speed law is unconstitutional cannot be sustained. (*Ex parte* Daniels, 183 Cal. 636, 647 [192 P. 442, 21 A. L. R. 1172]; *In re* Leach, 215 Cal. 536, 544 [12 P. 2d 3].)

The contention that the killing of six people by only one act does not authorize six accusations and and convictions of manslaughter cannot be sustained. (People v. Majors, 65 Cal. 138 [3 P. 597]; People v. Defoor, 100 Cal. 150 [34 P. 642]; People v. Lagomarsino, 97 Cal. App. 2d 92 [217 P. 2d 124]; People v. Holman, 72 Cal. App. 2d 75, 100 [164 P. 2d 297]; Fricke's California Criminal Law, sixth edition, p. 389; 20 A. L. R. 341; 113 A. L. R. 222.) In the Holman case, *supra*, after the deferdant had set fire to a hotel and 22 people burned to death, he was properly convicted of homicide as to all 22. In the Lagomarsino case, *supra*, where the defendant robbed many people he was properly convicted of robbery for each victim of his crime.

It follows, therefore, that contrary to appellant's contention he was correctly sentenced to one year in jail for each offense. Section 19a was not intended to limit imprisonment in the county jail to a period of one year where several misdemeanors have been committed and the sentences run consecutively. (People v. Carr, 6 Cal. 2d 227, 228 [57 P. 2d 489]; see General Casualty Co. v. Justice's Court, 41 Cal. App. 2d 784, 788 [107 P. 2d 663].) "Conviction of misdemeanor" as used in section 19a, Penal Code, means: conviction of *a* misdemeanor.

The court properly rejected seven of appellant's proffered instructions for the reason that they were repetitions of instructions which the court actually read to the jury. By his eighth rejected instruction he would have had the jury directed to ignore the publicity the case had received from the newspapers, radio and other news-casting agencies but to be solely guided by the evidence they had heard in the court room. The court properly refused to reach such instruction. No showing had been made that the jury had read or heard stories from other sources or that there was any reason to suspect they had, or that there was any other need for the instruction. Besides the court told the jury that they must determine the facts from the evidence produced before them.

The judgment is affirmed.

FOX, *J.*, and ASHBURN, *J.*, concurred.